

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 96-329-E - ORDER NO. 96-852  
DECEMBER 31, 1996

IN RE: Joint Petition of Duke Power Company                    )  
and Northbrook Carolina Hydro, L.L.C.                        )  
to Transfer Certificates Pursuant to                        )  
the Sale of Certain Small Hydroelectric                        )  
Facilities located in the Duke Service                        )  
Area.    )

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This matter comes before the Public Service Commission of South Carolina (hereinafter "the Commission") for approval of the Petitions for Transfer or Issuance of Certificates of Public Convenience and Necessity and Declaratory Order, jointly filed on October 21, 1996, by Duke Power Company (hereinafter "Duke") and Northbrook Carolina Hydro, L.L.C. (hereinafter "Northbrook"), (hereinafter together "the Petitioners").

The Petitions stated that Duke and Northbrook had entered into a sales contract for the sale of seven (7) hydroelectric plants, including three (3) individual facilities located in South Carolina (hereinafter "the Contract"). Furthermore, the Petition for Transfer or Issuance of Certificates of Public Convenience and Necessity (hereinafter "Certificates") requested that this Commission transfer or issue new Certificates for the listed hydroelectric facilities to Northbrook. The Petition for Declaratory Order requested that this Commission issue an Order

declaring that the listed hydroelectric facilities were entitled to the capacity credits set forth in the Purchased Power Agreements negotiated between Duke and Northbrook (hereinafter "Purchased Power Agreements").

Adequate notice of the proposed sale was provided through advertisements in HYDROWIRE, and in eight (8) large newspapers, four (4) in South Carolina and four (4) in North Carolina. Proof of publication was filed by Duke with this Commission. There were no intervenors or protestants in this docket.

A formal hearing was not required in this matter pursuant to S. C. Code Ann. Section 58-27-870 (F)(Supp. 1995). This matter received a due hearing and was considered and approved by the majority vote of the full Commission at the weekly Commission meeting held on November 26, 1996.

Counsel of record for Petitioner Duke are Steve C. Griffith, Jr., Esquire, William Larry Porter, Esquire, Ronald V. Shearin, Esquire, William F. Austin, Esquire and Richard L. Whitt, Esquire. Counsel of record for Petitioner Northbrook is Clayton S. Curry, Jr., Esquire. The Commission is represented by F. David Butler, General Counsel.

After a review of the Petitions and the applicable law, the Commission makes the following findings of fact and conclusions of law:

#### FINDINGS OF FACT

1. The Petitioners allege that these hydroelectric facilities, i) the Boyds Mill Facility, ii) the Hollidays Bridge

facility and iii) the Saluda facility (hereinafter "the facilities"), are individual facilities each having a fair market value of less than One Million Dollars (\$1,000,000.00).

Petitioners calculated a current fair market value using a ratio of the firm capacity MW of each individual facility to the aggregate sales price of all seven facilities.

2. Subsequent to the date of issuance of this Order, Northbrook will be a qualifying facility (hereinafter "QF"), selling energy to Duke after Northbrook assumes ownership and operation of the facilities.

3. Subsequent to the date of issuance of this Order, an energy sale is contemplated between Northbrook and Duke.

4. The Purchased Power Agreements negotiated between Duke and Northbrook contain a requirement that this Commission's approval of payment by Duke of capacity credits to Northbrook must be obtained.

5. The Commission finds that it is authorized under Section 292.304(b) of the Federal Energy Regulatory Commission rules implementing the Public Utility Regulatory Policies Act of 1978 (hereinafter "PURPA"), to establish rates for purchases from pre-PURPA capacity that include capacity credits, up to the utility's full avoided costs, upon a showing by the QF that: (a) such payment of capacity credits is just and reasonable to the electric consumer of the electric utility and in the public interest; and (b) capacity credits are necessary to support additional investment in the generating facilities in order for

the QF to continue to produce electric power. We find that Petitioners have made a proper showing of the requirements outlined in (a) and (b) above.

6. The Commission finds that the Purchased Power Agreements contain negotiated rates under which Duke will purchase electricity from Northbrook which do not exceed the avoided costs rates recently approved for Duke in Docket No. 95-1192-E.

7. Approval by this Commission of the transfer of the three hydro facilities from Duke to Northbrook is not required.

8. There were no intervenors or parties of record other than Duke or Northbrook.

#### CONCLUSIONS OF LAW

1. The Commission concludes that this matter has received due hearing in its weekly Commission meeting and there is no requirement for a formal hearing.

2. Adequate notice of this matter was provided to the public.

3. The Commission concludes that the current fair market value of each individual facility is less than One Million dollars (\$1,000,000.00) and pursuant to Section 58-27-1300, S. C. Code Ann. (1976, as amended), the sale described in the Petition does not require Commission approval.

4. The Commission concludes that the energy sale contemplated in the Petitions should be and is hereby approved.

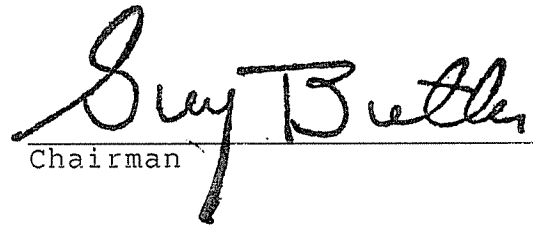
5. The Commission concludes that three (3) facilities described in the Petitions are entitled to the capacity credits

set forth in the Purchased Power Agreements negotiated between Duke and Northbrook.

6. The Commission concludes that Northbrook will not serve as a utility and will not be required to have Certificates of operate and Northbrook may proceed to operate the listed hydroelectric projects as outlined in the Petitions filed in this docket.

7. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

  
Chairman

ATTEST:

  
Deputy Executive Director

(SEAL)

**DISSENTING OPINION OF COMMISSIONER WARREN D. ARTHUR, IV:**

I respectfully dissent from the majority's opinion in this matter. I do not believe the contract for energy sales between Duke and Northbrook Carolina Hydro, L.L.C., should have been approved by this Commission without the requirement that Northbrook Carolina Hydro, L.L.C. maintain a liability policy equal to Duke Power Company's liability policy on these projects. The transfer is certainly in the best interests of Duke's stockholders, and even

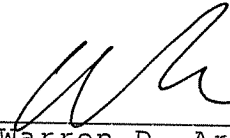
Duke's ratepayers (provided they are not harmed by any future dam breaks), but certainly not the citizens of South Carolina.

These three projects are all quite old. Construction of the Boyds Mill Hydroelectric Station was commenced in 1909. The Hollidays Bridge Hydroelectric Station was built in 1898, and the Saluda Hydroelectric Station was built in 1905. Duke has admitted to the Commission that it is transferring the dams to Northbrook in order to avoid potential liability. As owner of the hydro projects, Duke maintained a liability policy in the amount of \$25,000,000, whereas Northbrook's policy is only in the amount of \$10,000,000. In the event of loss greater than the policy limits, it is doubtful that plaintiffs could reach the assets of Northbrook's parent company in order to fund judgments since Northbrook is a stand alone subsidiary. The parent company, Northern States Power Company, has not pledged its assets to support Northbrook. Duke's assets totaled approximately \$10,300,000,000. By comparison, Northbrook's assets are significantly less and potentially inadequate. I believe that, in the event of a disaster, the liability policy and the assets of Northbrook would be depleted quickly by judgments for real and personal property loss, personal injury damages and emotional distress awards. The result of this is to increase the financial

risks of the citizens of South Carolina by a minimum of \$15,000,000 and probably many millions more.

I therefore dissent from the majority opinion.

Respectfully submitted,

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Warren D. Arthur, IV  
Commissioner, Sixth District

STATEMENT

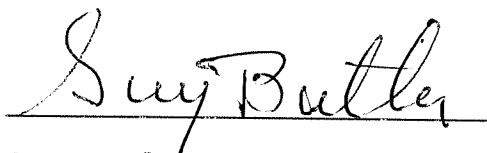
The undersigned Commissioners hereby issue the following statement regarding the Dissenting Opinion.

Commissioner Arthur's initial Dissenting Opinion was drafted, and apparently his vote in this matter cast, under the mistaken belief that this Commission was approving the transfer of the three (3) hydro facilities from Duke Power Company to North Carolina Hydro, L.L.C. After reading the undersigned's initial statement stating that no such approval had been given, he then attempted to tie the Purchased Power Agreements to the issue of liability policy limits.

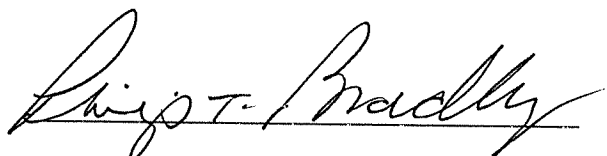
Commissioner Arthur still states that "[T]he transfer is ... not [in the best interest of] the citizens of South Carolina." Whether or not the transfer is in the best interest of the citizens of South Carolina is not an issue before this Commission. This Commission has no authority to approve nor disapprove the transfer.

As to tying the approval of the Purchased Power Agreements to a requirement that certain limits of liability insurance be maintained, this Commission has no such authority. Our Supreme Court has clearly stated that this Commission only has the authority expressly granted to it. No such authority as to liability limits in this case exists. Further, since the electricity generated by the hydro facilities is being purchased below Duke's avoided costs, the Purchase Power Agreements are clearly in the public interest. Even if the Commission tried to tie the liability limit issue to the Purchase Power Agreements, we have no authority to monitor nor enforce such a requirement since we have no jurisdiction over Northbrook Carolina Hydro.

The issue of the liability insurance required by owners of dams is clearly one to be left to the wisdom of our State Legislature. The State Legislature would have the ability to enforce such limits and is better qualified to determine the appropriate amount of such limits. The withholding of approval by this Commission of a contract which is in the public interest to extract a condition which is not within the authority of this Commission is not appropriate.



Guy Butler, Chairman



Philip T. Bradley, Vice Chairman

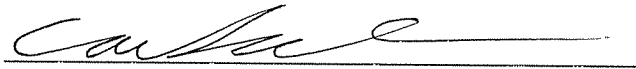




Cecil A. Bowers, Commissioner



William "Bill" Saunders



C. Dukes Scott, Commissioner

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**STATEMENT OF COMMISSIONER WARREN D. ARTHUR, IV**

With regard to the rebuttal statement of my dissent it appears that the majority must not be comfortable with their opinion if they felt they had to write an "almost unheard-of rebuttal" to my dissent.

I am really surprised that the rebuttal would even refer to an dissent opinion that was merely the work in progress of a staff member. I am even more dismayed that the rebuttal would use the words that "apparently his vote in this matter (was) cast, under the mistaken belief". This amounts to in my opinion pure speculation about what I might have been thinking. Certainly, working in progress of a staff member and somebody's opinion about what someone else might have been thinking would not have been

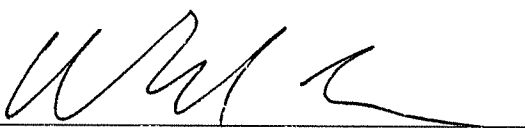
allowed into the record of the case had it been objected to, and I don't think these kinds of things should be in our Order.

They also accuse me of not knowing what we were doing with regard to the transfer and the approval of the purchase power agreements where, in fact, it was the staff member who didn't know what we were doing (because the staff member did not have access to all the information at the time the draft was being worked on).

While the SC Public Service Commission may not have the express authority to require Northbrook Carolina Hyrdo to carry the same 25 million dollar insurance policy (vs. 10 million) that Duke had, we certainly have an implied inherent authority (which we have used in this way a number of times during my service on the Commission in order to encourage companies to do what we felt like was right) to not approve any agreement unless we feel the public interest is being at least as adequately protected. The State Legislature I believe has in fact elected us and given us the responsibility to protect the public in these kinds of situations.

I apologize to and at the same time applaud anyone that has read all the way to this point in this Order. I am perfectly comfortable with my dissent and I am only responding to this rebuttal because I believe that it is based not on fact or what is in the record but purely on staff work product and pure speculation.

Respectfully submitted,



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Warren D. Arthur, IV  
Commissioner, Sixth District